

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 4, 2006

UNITED MINE WORKERS OF	:	COMPENSATION PROCEEDING
AMERICA, LOCAL 1248,	:	
Complainant	:	Docket No. PENN 2002-23-C
	:	
v.	:	
	:	
MAPLE CREEK MINING, INC.,	:	Maple Creek Mine
Respondent	:	Mine ID 36-00970

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine. The complaint was later amended to assert claims by miners who worked at Maple Creek's preparation plant who also were allegedly idled by the same order.¹ Respondent has moved for summary decision, and the UMWA has opposed the motion. As explained more fully below, the motion is denied.

The Issue to be Resolved

Miners typically are not paid if they do not work. MSHA enforcement actions that result in closing all or part of a mine can, therefore, have a significant economic impact on both the mine operator and any miners idled by the enforcement action. Section 111 of the Act provides limited relief to miners under certain conditions.² The first two sentences of the section provide

¹ Complainants' motion to amend the complaint was granted by order dated February 20, 2002. Respondent's motion to reconsider was denied by order dated October 5, 2005.

² Section 111 reads, in pertinent part:

If a coal or other mine or area of such mine is closed by an order issued under section [103], section [104], or section [107], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the

less than one shift's pay for miners idled by certain closure orders. That limited compensation is available regardless of the result of any review of such orders.

The third sentence of the section, upon which the instant claim is based, provides for up to one week's compensation for miners idled by orders entered under sections 104 or 107 of the Act, because of an operator's failure to comply with any mandatory health or safety standard, but only "*after all interested parties are given an opportunity for a public hearing, . . . and such order is final.*" The complaint here seeks compensation for miners idled by Order No. 7060223, which was issued pursuant to section 104(b) of the Act.

Maple Creek contends that Order No. 7060223 was later vacated in conjunction with settlement of a civil penalty proceeding and, consequently, that no compensation is available under the third sentence of section 111. The UMWA argues that compensation is due because the miners were, in fact, idled by the order and, since Maple Creek paid a civil penalty for the underlying citation, its culpability for the alleged violation has been conclusively established. The issue presented by the motion is whether Order No. 7060223 is "final" within the meaning of section 111. For the reasons set forth below, I find that the order was final and deny Maple Creek's motion.

Facts

On July 30, 2001, at 10:35 a.m., an MSHA inspector found that the bleeder system was not effectively ventilating a section of Maple Creek's mine, and issued Order No. 7082156, an "imminent danger" withdrawal order, pursuant to section 107(a) of the Act.³ The order noted that Citation No. 7082157, alleging a violation of 30 C.F.R. § 75-334(b)(1), would be issued for management practices that resulted in the condition. Citation No. 7082157 was issued at the

operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but not for more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section [104] or section [107] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled by such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. . . . [30 U.S.C. § 821].

³ A copy of Order No. 7082156 is attached as Exhibit 1 to Respondent's reply memorandum in support of its motion.

same time as the order and alleged a violation of the subject regulation, which requires that the bleeder system “continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings.”⁴ While the “Condition or Practice” section of the citation stated that no abatement time was set, the citation included a notation that termination was due the following day by 2330, 11:30 p.m. MSHA conducted a ventilation survey of the mine the following day. As a result of that survey, Order No. 7082156 was terminated at 1:00 p.m. on July 31, 2001, by a different inspector. Further modifications to Order No. 7082156 and Citation No. 7082157 were made on January 4, 2002, eliminating language stating that the violation cited in the citation was a contributing factor to the condition prompting the imminent danger order.

The inspector who had issued the order and citation also returned to the mine on July 31, 2001, and found that virtually no steps had been taken to abate the violation alleged in the citation. At 4:10 p.m., he issued Order No. 7060223 pursuant to section 104(b) of the Act, based upon his conclusion that Maple Creek had expended “little or no effort” to correct the cited condition.⁵ The 104(b) order required that all miners be withdrawn from the “5 West longwall section and the 5 West, 6 West and 7 West bleeder system.” The order was modified on August 2 to allow some power to be restored to the area, but no mining of coal was permitted. On August 4 the modification was rescinded, and the order was reinstated in its original form. The order was allegedly terminated on August 7, 2001, and mining operations were permitted to resume.

On February 25, 2002, MSHA issued proposed civil penalty assessments for various citations and orders issued to Maple Creek, including Citation No. 7082157, for which a penalty of \$9,000.00 was proposed. Maple Creek contested that and other proposed penalties on March

⁴ A copy of Citation No. 7082157 is attached as Exhibit 2 to Respondent’s reply memorandum in support of its motion.

⁵ A copy of Order No. 7060223 is attached as Exhibit B to Complainant’s opposition to the motion. Section 104(b) of the Act provides, in pertinent part:

(b) If, upon any follow-up inspection of a coal or other mine, and authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator or such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [30 U.S.C. § 814(b)].

18, 2002. On May 3, 2002, the Secretary filed with the Commission a Petition for Assessment of Civil Penalties against Maple Creek, Commission Docket No. PENN 2002-116, which sought the imposition of civil penalties in the total amount of \$36,853.00, for 12 alleged violations of the Secretary's regulations prescribing mandatory safety standards for underground coal mines.⁶ Among the enforcement actions at issue was Citation No. 7082157.

The petition in PENN 2002-116 was served on Maple Creek and Local Union 1248 of the UMWA. By letter dated June 19, 2002, the UMWA sought and was granted party status in that case, presumably to protect its members' interests in the instant compensation claim.⁷ On July 29, 2003, the Secretary filed a Motion for Decision and Order Approving Partial Settlement, which sought Commission approval of a settlement of all but one of the violations at issue.⁸ Among the violations settled was Citation No. 7082157. The motion described the citation and added the following discussion:

A § 104(b) Order Number 7060223 was issued on July 31, 2003 [sic], for the Respondent's failure to correct the condition cited in Citation Number 7082157. A penalty of \$9,000.00 was specially assessed based on the high negligence rating and the § 104(b) Order.

After further discussions with the operator, the Secretary recommends that the citation should remain classified as high negligence but Order Number 7060223 should be vacated. While the negligence is still high, the parties submit that it is somewhat less than initially determined. Respondent was unsuccessfully attempting to correct the condition listed in Citation No. 7082157 at the time the 104(b) Order No. 7060223 was issued. Therefore, a reduction in the assessed penalty to \$2,000.00 is warranted.

Settlement Motion, at 2-3.

The UMWA was served with a copy of the motion, but did not file anything in response. On August 11, 2003, a Decision Approving Partial Settlement was entered, granting the Secretary's motion and approving the proposed reduction of the civil penalty assessed for Citation No. 7082157.⁹

⁶ A copy of the petition, excluding citations not relevant here, is attached as Appendix 1, to this order.

⁷ Copy attached as Appendix 2.

⁸ Copy attached as Exhibit 2 to Respondent's motion.

⁹ Copy attached as Exhibit 3 to Respondent's motion.

Discussion

The complaint for compensation, as amended, seeks up to one week's compensation, plus interest, for each miner idled by the issuance of Order No. 7060223, pursuant to section 111 of the Act. Based upon the representations in the Secretary's motion in PENN 2002-116, and the fact that the motion was granted, Respondent argues that Order No. 7060223 was vacated, i.e., never became final, and cannot, therefore, form the basis for an award of up to one week's compensation under section 111.

Section 111 stands apart from the interrelated structure for reviewing citations, orders and penalties created by section 105. The purpose of section 111 is to determine the compensation due miners idled by certain withdrawal orders, not to provide operators with an additional avenue for review of the validity of the Secretary's enforcement actions. *Local Union 2333, District 29, UMW v. Ranger Fuel Corp.*, 12 FMSHRC 363, 370-71 (March 1990); *Local Union 1810, District 6, UMW v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). The Secretary is a party in enforcement proceedings under section 105, whereas in compensation proceedings under section 111, only the miners, or their representatives, and the operator are parties. Consequently, the finality of any order, or modification thereof, must be determined by reference to the outcome of any relevant section 105 proceedings between the Secretary and the operator, and a claim for compensation under the third sentence of section 111 cannot be adjudicated until the subject order has become final under section 105.¹⁰

In *Nacco Mining*, the UMW sought compensation for miners idled by the modification of a section 104(d)(2) withdrawal order. The order had been issued on December 10, 1984, but was modified almost immediately and two other times, such that it did not result in the idling of miners. On May 7, 1985, Nacco paid the civil penalty that had been proposed for the violation alleged in the order. However, the order had not been terminated because the underlying condition had not been completely abated. On October 2, 1986, 22 months after the order had been issued, MSHA determined that no further time should be allowed to abate the violation, and modified the order for the forth time, resulting in the idling of miners. Neither the operator, nor the UMW contested the issuance of the order or any of the modifications, including the one that resulted in the idling of miners, and the operator had not contested the proposed civil penalty. The Commission noted that since there was no new violation alleged in the critical modification, no new penalty assessment was to be forthcoming, and held that "because Nacco did not avail itself of the opportunities to contest in a timely manner pursuant to section 105 either the validity of the section 104(d)(2) order, or the penalty proposed for the violation, or the validity of any of

¹⁰ Proceedings in this case had been stayed pending resolution of enforcement proceedings related to this case, and to a companion compensation proceeding between the same parties. Motions for summary decision were filed by Respondent in both cases in February 2006. The cases were reassigned to the undersigned Administrative Law Judge on April 5, 2006. An order granting Respondent's motion in the companion case, Docket No. PENN 2002-24-C, was entered this date.

the subsequent modifications, it is precluded from raising such challenges” in this compensation proceeding. 11 FMSHRC at 1240.

The Commission later held, in *Ranger Fuel*, that an imminent danger withdrawal order issued pursuant to section 107(a) of the Act is “final and valid on its face for purposes of section 111 compensation proceedings” if not contested pursuant to section 107(e)(1). 12 FMSHRC at 373; *See also, Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 777 (D.C.Cir. 1990). The review provisions of section 107(e)(1), which afford operators an opportunity to contest and request a hearing on the validity of a section 107(a) order within 30 days of notification thereof, were described as “parallel to the section 105 scheme for contest and review of section 104 citations and orders and related penalty proposals.” 12 FMSHRC at 371. Civil penalties are not typically assessed for section 107(a) orders because they need not and typically do not allege violations. Section 107(a) specifically provides that “issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.” 30 U.S.C. § 817(a). The overriding purpose of an imminent danger order is the immediate withdrawal of miners, and the investigation and identification of any underlying violations will often be delayed until long after the order was issued. *Local Union 1889, District 17 UMW v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1327-28 (Sept. 1986).

As noted in *Ranger Fuel* and *Nacco Mining*, section 105 creates a comprehensive scheme for contest and review of citations and orders issued pursuant to section 104 of the Act. Section 105(d) grants an operator the right to seek immediate review of a citation or order issued or modified pursuant to section 104.¹¹ Under section 105(a) an operator has a right to contest a citation or order after a civil penalty has been assessed. Hence, for a citation or order that alleges a violation, an operator will have two opportunities to challenge the enforcement action and request a hearing. Immediate review can be sought pursuant to section 105(d), and review can also be sought after the penalty is assessed under section 105(a). However, some orders, including typically orders issued under sections 104(b) and 107(a) of the Act, do not usually allege violations. Modifications of orders may also not allege a new violation. Under those circumstances, there will be no opportunity to seek review under section 105(a), and an operator wishing to contest the validity of the order or modification must exercise its right under section 105(d) to contest the issuance or modification of the order, or the order will be deemed final for purposes of section 111.

¹¹ Section 105(d) of the Act provides, in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 814 of this title, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or directing other appropriate relief. . . .

Neither Maple Creek nor the UMW claim to have contested the issuance of Order No. 7060223, the section 104(b) withdrawal order, and Commission records do not show notification of any such contest. There was no new violation charged in the order and there was no civil penalty assessed with respect to the order. While the settlement motion in PENN 2002-116 discussed the order, neither the petition in that case, nor Maple Creek's answer or amended and substituted answer specifically mention Order No. 7060223.¹² In describing Citation No. 7082157, which was issued on July 30, 2001, the "Proposed Assessment," a copy of which was attached to the petition, noted that the "Type of Action" was "104A-104B," and that the Secretary had determined to specially assess a penalty of \$9,000.00 for the alleged violation. App. 1. Noting the fact that action under section 104(b) had also been taken with respect to the citation, i.e., for failure of the operator to timely abate the violation, was entirely appropriate because "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation" is one of the factors that the Commission must consider in fixing the amount of a civil penalty. 30 U.S.C. § 820(i). The Proposed Assessment does not purport to propose a civil penalty for Order No. 7060223, which was issued on July 31, 2001. The Decision Approving Partial Settlement did not mention Order No. 7060223. It simply approved the settlement of the civil penalty for Citation No. 7082157, which had been duly contested by Maple Creek.

As noted in *Westmoreland*, section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. 8 FMSHRC at 1323. I find that resolution of the limited issue presented by the motion is governed by the cases discussed above. Because Maple Creek did not contest the issuance of Order No. 7060223 within 30 days of receipt, it became final for purposes of section 111. The validity of the order was not at issue in PENN 2002-116, and it was not affected by the settlement of the related citation. Consequently, Maple Creek's motion for summary decision must be denied.

ORDER

Upon consideration of the above, Respondent's Motion for Summary Decision is hereby **DENIED.**

Michael E. Zielinski
Administrative Law Judge

¹² The original answer was filed by Maple Creek's Safety Director. Maple Creek later retained counsel, who filed a Motion for Leave to File an Amended and Substituted Answer. By Order dated March 27, 2003, the motion was granted.

Distribution:

Judith Rivlin, Esq., United Mine Workers of America, 8315 Lee Highway, Fairfax, VA 22031

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

/mh